

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RUTH K. KITETA	:	DETERMINATION
	:	DTA NO. 813667
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and the Administrative Code of	:	
the City of New York for the Year 1989.	:	

Petitioner, Ruth K. Kiteta, 29 East 29th Street, New York, New York 10016, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1989.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 5, 1996 at 1:15 P.M. The Division of Taxation submitted a letter-brief on February 2, 1996. Petitioner submitted a letter-brief in reply on March 13, 1996, which date began the six month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Susan Hutchison, Esq., of counsel).

ISSUE

Whether petitioner has proven that she did not receive a check pursuant to a refund claimed on her 1989 personal income tax return, thereby necessitating a reduction in the tax asserted in a Notice of Deficiency for the year 1989 by the amount of such refund.

FINDINGS OF FACT

1. Petitioner, Ruth K. Kiteta, timely filed her 1989 New York State personal income tax return (Form IT-201). On said return petitioner claimed a refund of \$3,078.38.

2. Based on the amounts reported on petitioner's return, the Division of Taxation ("Division") issued a refund check to petitioner in the amount of \$2,382.54 on or about June 2, 1990. A photocopy of the front and back of this check was entered into evidence in this matter

by the Division. It is noted that the check bears the same address as stated by petitioner on her 1989 income tax return. It is further noted that the difference between the refund amount claimed by petitioner on her return and the amount of the refund check resulted from the Division's application of \$695.84 of the claimed amount to tax liabilities of prior years.

3. The refund check referred to above was negotiated. This fact is established by the existence of keypunched numbers indicating the amount of the check in the lower right corner of the front of the check. Additionally, the reverse side of the check contains the endorsement "Ruth Kiteta for Deposit Only". Also, although the photocopy of the check in evidence is somewhat poor there appear to be numbers on the back of the check indicative of bank processing.

4. On January 12, 1993, the Division issued to petitioner a Notice of Deficiency asserting \$2,920.00 in additional State and City income tax due, plus penalty and interest, for the year 1989. This deficiency resulted from certain adjustments made by the Internal Revenue Service to petitioner's reported Federal itemized deductions. Information regarding these adjustments was furnished by the IRS to the Division which made corresponding adjustments to petitioner's reported New York itemized deductions, calculated the resulting deficiency and issued the subject notice.

5. It should be noted that the starting point for the Division's calculation of the deficiency herein is petitioner's tax liability as reported on her 1989 New York State personal income tax return. Such calculation thus presumes that petitioner received her refund check for 1989.

6. Pursuant to a Conciliation Order, dated January 6, 1995, the Division cancelled the penalty asserted in the subject notice. Except for this adjustment, the Conciliation Order sustained the notice.

7. Petitioner's 1989 New York personal income tax return and a copy of petitioner's 1989 Federal return (Form 1040) were entered into evidence herein. Both of these documents bear petitioner's signature.

8. Petitioner denied that she received the refund check in question. She did testify, however, that the signature on the back of the check resembled her own.

9. In her Request for Conciliation Conference filed in respect of the subject deficiency, petitioner stated, in part:

"(1) When I filed my taxes for 1989 I received a refund for what I was entitled to.
(2) I never had to pay extra taxes for all the years that I have ever worked - I always received a refund."

SUMMARY OF PETITIONER'S POSITION

10. Petitioner did not dispute the adjustments made by the Division which resulted in the subject income tax deficiency. She thus did not dispute the basis for the Division's issuance of the Notice of Deficiency herein. Rather, petitioner asserted that she never received the refund check issued to her in respect of her 1989 reported overpayment. Consequently, petitioner asserted, the deficiency herein should be reduced by the amount of said refund check.

CONCLUSIONS OF LAW

A. Tax Law § 689(e) specifically places the burden of proof upon the petitioner with respect to all issues raised in a petition for redetermination of a deficiency of personal income tax (with certain exceptions not relevant herein). In this case, petitioner has failed to meet her burden of proof, imposed pursuant to this section, to show that the Notice of Deficiency herein should be reduced by the amount of the 1989 refund check.

Petitioner's position is premised on her contention that she neither received nor cashed the 1989 refund check. Petitioner asserted that the lack of any stamp on the check indicating the name of the bank that cashed the check shows that it was never cashed. The evidence presented, however, clearly shows that the refund check was issued and negotiated (see, Finding of Fact "3").

Additionally, the evidence herein compels the conclusion that petitioner herself negotiated the refund check. Specifically, the signature appearing on the back of the check purports to be that of petitioner, and the samples of petitioner's signature in the record, which appear on her 1989 Federal and State income tax returns, her Request for Conciliation

Conference, her petition, and her reply letter-brief, are all similar to the signature which appears on the refund check. Indeed, petitioner admitted in her testimony that the signature on the back of the check was similar to her own. Moreover, other than petitioner's unsubstantiated testimony, there is no evidence in the record supporting petitioner's claim that the signature on the check was a forgery. Notably lacking from the record on this point is any expert testimony regarding the authenticity of the signature appearing on the check. Additionally, petitioner did not present any bank records to show that no deposit in the amount of \$2,382.54 had been made. Also, in her request for conciliation conference, petitioner indicated that she received "a refund for what [she] was entitled to" (see, Finding of Fact "9"). Petitioner has thus clearly failed to meet her burden of proving her contention that she did not endorse the refund check in question.

Since petitioner has failed to establish her factual contentions regarding the refund check, and since she did not challenge the adjustments made by the Division which resulted in the deficiency, there is no basis upon which to modify the tax deficiency in any respect.

B. The petition of Ruth K. Kiteta is denied and the Notice of Deficiency dated January 12, 1993, as modified by the Conciliation Order dated January 6, 1995, is sustained.

DATED: Troy, New York
August 8, 1996

/s/ Timothy J. Alston

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ADMINISTRATIVE LAW JUDGE